SC92750

IN THE SUPREME COURT OF MISSOURI

THOMAS A. SCHWEICH, Missouri State Auditor,

Appellant/Cross-Respondent,

vs.

JEREMIAH W. NIXON, Governor of the State of Missouri,

Respondent-Cross-Appellant.

From the Circuit Court of Cole County, Missouri,
The Honorable Jon E. Beetem, Judge

CROSS-APPELLANT'S REPLY BRIEF

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1. The Auditor proposes a rule allowing him standing to challenge "E" appropriations that would permit him to challenge spending pursuant to any appropriation—something that far exceeds his constitutional authority and the very narrow standing recognized in *Kelly v. Hanson*.

The Auditor claims that he has standing to obtain relief "on the unconstitutionality of the 'E' appropriations and Cross-Appellant's transfers of funds under the 'E'" (Appellant's Reply at 20) for two reasons. Each reason would, if endorsed by this Court, dramatically extend the Auditor's reach—placing its limits well beyond his constitutional role.

The Auditor's principal and broadest standing argument begins with the claim that merely because he has "a duty to establish appropriate systems of accounting," he can challenge any action that must, in his view, be accounted for. Appellant's Reply at 20-21. He believes that even policy decisions regarding the timing of spending must be "accounted" for—though he has never explained how, nor identified a standard to be used. His first argument, then, would stretch this Court's decision in *Kelly v. Hanson*, 959 S.W.2d 107 (Mo. banc 1997), so far that it is hard to see that any part of government would not be a proper subject of a suit by the state auditor.

In *Kelly v. Hanson* this Court permitted the state auditor to enforce in court a very specific method of accounting for a defined set of revenues upon or after receipt. But we do not have that here. The Auditor makes no claim that there is anything improper in how the State's revenue is being accounted for as it is received, nor in how it is spent. The dispute is about projections and estimates of future revenues. And nothing in the Missouri Constitution or state statute gives the state auditor authority to define the method of making or documenting estimates and projections as to what may happen in the future, nor to second-guess policy decision (such as restrictions on spending) based on those estimates and projections.

The Auditor's second argument in defense of his alleged standing to challenge "E" appropriations and "transfers" to "E" appropriations is that he has standing based on "the $300,000 appropriated by the General Assembly [for the Auditor's office], which was permanently withheld by" the Governor. Appellant's Reply at 22. The reference to the funds being "permanently withheld" highlights his effort to have the Court address what happened at the end of FY 2012. Again, there is nothing in the record here to say what happened at or even near the end of FY 2012. The record was closed long before that time.

The Auditor's citation in his second standing argument to *Battlefield Fire Protection Dist. v. City of Springfield*, 941 S.W.2d 491, 492 (Mo. banc

1997), is curious. There this Court said: "An annexation ordinance that causes a loss of tax revenue to a political subdivision does not directly and adversely affect the political subdivision to give it standing if there is a concomitant decline in the need for the subdivision's services and a consequent decline in costs." This case presents a rough parallel. The $300,000 that the Auditor complains about was for completing special audits pursuant to proposed new legislative authority. But the General Assembly never gave the Auditor that authority. Under the logic of *Battlefield*, the Auditor ought not be allowed to rely on the alleged loss of $300,000 because that alleged loss was offset by the General Assembly's decision to decline to give him the authority to perform the service the funds were to cover.

But the biggest problem with the Auditor's second standing argument is that he asks the Court to allow him to bootstrap his personal interest in the restriction of small portion of the $8,470,103 appropriated to his office for FY 2012 into general standing to challenge the State's expenditures pursuant to other appropriations. In the Auditor's view, apparently, if a governor restricts any portion of the appropriation to the auditor's office for even a day, that opens the door for the auditor to go to court to challenge spending pursuant to any and every other appropriation to which, in his view, restricted money was impermissibly "transferred." But nothing in the

Missouri Constitution or Missouri statute permits the courthouse door to open to the auditor in that fashion.

Suits regarding state spending pursuant to appropriations are broadly permissible under taxpayer standing. *See Manzara v. State*, 343 S.W.3d 656, 659 (Mo. banc 2011). And as a taxpayer, Thomas Schweich could bring an appropriate taxpayer suit. But here the Auditor does not sue as a taxpayer—nor could he do so using state-employed counsel.

The Missouri Constitution specifically limits the role of the state auditor. *See* Art. IV, § 13; *Brown v. Carnahan*, 370 S.W.3d 637, 648 (Mo. banc 2012). To paraphrase this Court's language in *Director of Revenue v. State Auditor*, 511 S.W.2d 779, 783 (Mo. 1974), it is not the business of the state auditor to judge the performance of a governor, nor to operate the Division of Budget and Planning, nor to determine which appropriations will or will not be allowed to be spent—or when—under the first clause or reduced under the second clause of Art. X, § 24. The office of state auditor may be a "bully pulpit" from which to complain about those things. But that office is not vested with authority to act like a taxpayer and sue on those complaints.

2. Making reference to prior oral statements and to a letter saying that "E" appropriations are not authorized by state law is not enough to timely state a claim as to the constitutionality of "E" portions of appropriations bills under Art. X, § 23.

The Auditor claims that in this suit he timely raised the question of the constitutionality of estimated or "E" appropriations. But he does not and cannot point to any reference in his Petition—his first opportunity to state such a claim—to any bill he was challenging, nor to any constitutional provision any bill might violate.

Instead, he points, first, to three paragraphs in his Petition where he makes factual allegations, not legal claims. Appellant's Reply at 23, citing ¶¶ 9-11, LF 11. In those paragraphs, the Auditor says that his auditors met with members of the Governor's staff and budget officials and asked them to review a draft letter that complained about "the unconstitutionality of Defendant's withholds and reallocations for FY 2012." *Id.* ¶ 11. We are not aware of any support for the premise that a factual recitation that a plaintiff, prior to filing a petition, made an oral complaint to a defendant about the constitutionality of his actions could be considered the presentation of a constitutional question to a court.

And even if it could, this particular recitation would not meet the requirement that "the party presenting the constitutional issue must specify

for the benefit of the trial court the constitutional provisions which he invokes." *City of Florissant v. Rouillard*, 495 S.W.2d 418, 419 (Mo. 1973). After all, the paragraphs the Auditor cites from his petition reference no constitutional provision at all. Nor do they identify any statute that might be unconstitutional, referring not to statutes but to executive actions.

The Auditor points, second, to his Exhibit C, a letter from him to the Governor, referenced in paragraphs 9-11 of his Petition. LF 11, 24. But that letter does no more than the paragraphs in the Petition do. It merely demonstrates that the Auditor and his staff communicated a complaint to the Governor. It says nothing about a claim being brought in court.

And in terms of specificity, the letter is even more vague than the paragraphs in the petition. It asserts that neither "the CRE nor the E appropriations are authorized by state law." Exhibit C at 4, LF 24. It does not even use the word, "unconstitutional." And it recommends "[a]mending state law," not a constitutional amendment. Again, we are not aware of any support for the proposition that attaching to a petition a letter saying that something is not "authorized by state law" is sufficient to meet the longstanding requirement that each constitutional claim be made in court promptly and specifically.

The Auditor's reference to his paragraph 23 does not solve his problem. The constitutional problem alleged there was, as the Auditor candidly

announces, whether the Governor "unconstitutionally violated separation of powers." Appellant's Reply at 23. The Auditor's argument is that the Governor, in the executive branch, impermissibly exercised the power of the legislative branch. That is not the same question as whether the appropriations bills violated Art. IV, § 23. And it is an argument with little basis in logic.

The Constitution (absent a veto override) makes the enactment of legislation, including appropriations bills, a joint effort of the legislative and executive branches: the General Assembly passes the bills, and the governor signs them. Here, the legislative and executive branches performed those constitutionally defined roles with regard to each appropriations bill for FY 2012. The Governor then authorized expenditures pursuant to the appropriations bills enacted by the General Assembly. That was not an invasion of the legislature's constitutional power by the Governor, the only defendant here.

Regardless of whether Missouri generally has a "liberal standard" (App. Reply at 23) as to notice in a petition, as to "E" appropriations, the claims made in the Auditor's Petition did not meet the narrower, more specific standard that applies to constitutional challenges.

CONCLUSION

For the reasons stated above and in the Respondent/Cross-Appellant's brief, the Court should hold that the Auditor lacked standing to bring this suit, or in the alternative, that the Auditor did not timely challenge the constitutionality of any "estimated" or "E" appropriation in any appropriations bill.

Respectfully submitted,

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CERTIFICATION OF SERVICE AND COMPLIANCE

I hereby certify that on the 20th day of February, 2013, the foregoing brief was filed electronically via Missouri CaseNet and served electronically to:

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I further certify that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 1,744 words.

/s/ *James R. Layton*
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